Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions Of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
The Southern Public Communication Association's, Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders	)	

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

Since the release of the *Wisconsin Order* in 2002, payphone service providers across the country have seen significant reductions in payphone rates. The payphone providers are currently receiving these substantial decreases. But that is not enough. They want more. They want retroactive refunds even in cases where there is no justification or authority to award such a result.

Associations like the Southern Public Communication Association (SPCA) and the Illinois Public Telecommunications Association (IPTA), are asserting that there is an outstanding legal controversy and a need to remove uncertainty with respect to the enforcement of compliance with the intrastate tariff requirements of 47 U.S.C. §276. They filed petitions for declaratory rulings to the Federal Communications Commission ("Commission") seeking refunds of a portion of the payphone rates that have been

charged over the past seven years. These petitions are misplaced since the Commission delegated the responsibility of determining the adequacy of those rates to the states. Absent a state law provision providing relief from the filed-rate doctrine, the petitioners will not get a retroactive application of the large discounts they were recently rewarded on a state-by-state basis. There is no federal relief due to the lack of a provision in 47 U.S.C. §276 to preempt the states' filed-rate doctrines.

The only outstanding legal controversy is the question of why the SPCA and IPTA chose to seek a declaratory ruling when the Commission clearly delegated review of the issues to the state process. The states acted and applied the standards provided by the Commission and when the Commission reinterpreted that standard the state commissions reacted and applied that further guidance. Payphone Associations should not second guess the years of state compliance with the Commission's process.

The Commission should see through this attempt by the SPCA and the IPTA to circumvent the Commission's delegation of the matter to the state commissions and reject the petitions.

BACKGROUND

Congress enacted 47 U.S.C. §276 to "promote competition among payphone service providers and promote the widespread deployment of payphone service to the benefit of the general public.[1]" The statute required the Commission to prescribe regulations to prohibit any BOC from (1) subsidizing its payphone service directly or indirectly from its telephone exchange operations or its exchange access operations, and

[1] 47 U.S.C. §276(b).

(2) preferring or discriminating in favor of its payphone service after the effective date of rules prescribed under §276(b). The Commission then released a series of "Payphone Orders" defining the blueprint for achieving the directive from the statute.

- **First Payphone Order**.[2] This first Report and Order outlined the groundwork for all the rules called for by the 47 U.S.C. §276(b). The order required each LEC to certify that it has complied with a number of requirements including the institution of effective intrastate tariffs reflecting the removal of subsidies. The order also required LECs to use the "new services test" to ensure costs were consistent with the requirements of §276.
- **The Reconsideration Order**.[3] The Order on Reconsideration required all LECs to file tariffs for basic payphone lines at the state level only.[4] The Commission also declared that it would rely on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of §276.[5] The Order provided that any state unable to review these tariffs could require the LECs operating in their state to file the tariffs with the Commission.[6]

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[2] *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*").

[3] *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No 96-128, Report and Order, 11 FCC Rcd 21233 (1997) ("*Reconsideration Order*").

[4] *Id*. at ¶ 163.

[5] *Id*.

[6] *Id.*

- **The Bureau Order**.[7] This order granted a limited waiver of the requirement to file interstate tariffs for 45 days. The order also clarified that for purposes of meeting all of the requirements necessary to receive payphone compensation, the question of whether a LEC has effective intrastate tariffs is to be considered on a state-by-state basis.[8]
- **The Bureau Clarification Order**.[9] This order granted a limited waiver of the requirement to file intrastate tariffs in compliance with the "new services test". In order to take advantage of this extension to file the intrastate tariffs 45 days late, the LEC had to agree to reimburse its customers or provide credits when the newly tariff rates were lower than the existing tariff rates.[10] This reimbursement related solely to the 45-day delay and was only applicable to LECs taking advantage of the waiver opportunity. Again the order repeatedly references the intrastate tariff requirements and the states duty to review and determine the effectiveness of those rates.[11]
- **The *Wisconsin Order***.[12] The Commission expressed its preference that state commissions review intrastate tariffs in the interest of federal-state

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[7] *In the matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No 96-128, Report and Order, 11 FCC Rcd 20997 (1997) ("*Bureau Order*").

[8] *Id.* at ¶33.

[9] *In the matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No 96-128, Report and Order, 11 FCC Rcd 21370 (1997) ("*Bureau Clarification Order*").

[10] *Id*. at ¶2.

[11] *Id*. at ¶¶ 1, 2, 6, 8, 9, 10, 11, 12.

[12] *In the matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No 96-128, Report and Order, 11 FCC Rcd 2051 (2002) ("*Wisconsin Order*").

comity, but noted that it would review the tariffs for state commissions unable.[13] The Wisconsin Commission determined that it could not review the intrastate tariffs in Wisconsin to determine their compliance with 47 U.S.C. §276. The Commission agreed to review its intrastate tariffs. The Commission recognized that the disparate applications of the new services across the country and offered this order to assist states in applying the test in their respective states.[14] The order discussed the rationale and provided more specific interpretations which modified the application of the "new services test".

- **Consolidated Petitions for Declaratory Ruling.[15]** On November 19, 2004, the Commission released a notice seeking comments on the SPCA's petition for a declaratory ruling concerning refund of payphone line rate charges in docket number 96-128. The Commission also indicated that it would consider SPCA's petition with its consideration of the IPTA's petition for declaratory ruling filed July 30, 2004. Comments on the IPTA petition were due in September of 2004 when the Public Utilities Commission of Ohio was in the rehearing stage of its application of the *Wisconsin Order* guidance.[16] Both petitions ask the Commission "to

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13 *Id*. at ¶15.

14 *Id*. at ¶2-3.

15 Hereinafter "Consolidate Petitions" and "Consolidated Petitioners".

16 *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Ohio Commission Case Number 96-1310-TP-COI. Out of respect to the rehearing process in Ohio, the Ohio Commission exercised restraint in its comments on the issues, limiting its comments to the misrepresentations of the Ohio record by the

resolve an outstanding legal controversy and to remove uncertainty with respect to the enforcement of the Commission's orders regarding charges for network services provided to payphone service providers pursuant to 47 U.S.C. §§201,202, and 276".

DISCUSSION

A. Review of intrastate tariffs compliance with 47 U.S.C. §276 was delegated to state commissions to determine on a state-by-state basis.

The Commission should not entertain requests for declaratory rulings that revolve around specific facts of a particular situation. In fact the Commission has determined that a declaratory ruling is not appropriate where the resolution of the petition is better resolved on a case by case basis.[17] The consolidated petitions ask the Commission to clarify an outstanding legal controversy and remove uncertainty. A fair unbiased reading of the *Payphone Orders* should provide a clear view of the Commission's expectation that the matter be determined at the state level.

There should be certainty concerning the Commission's position on reviewing of intrastate tariffs for compliance with §276. The orders of the Commission governing the charges for network services provided to payphone service providers delegate the application and review of these rates to state commission jurisdiction. The Commission has stated its reliance on the states to ensure that the basic payphone line is tariffed by the

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Payphone Association of Ohio the Commission filed brief comments concerning the importance and integrity of the state process.

[17] *Omnipoint Communications New York MTA Frequency Block A*; Establishment of New Personal Communications Services, 61 Fed. Reg. 45903, FCC Docket Nos. 90-314, 96-340 (August 30, 1996) at ¶ 6 (hereinafter "*Omnipoint*").

LECs in accordance with the requirements of Section 276.[18] It is for the states to determine the adequacy of the basic payphone line tariff and ensure that the rates, terms and conditions comply with 47 U.S.C. § 276.[19] The consolidated petitioners refuse to recognize this process declared by the Commission.

The Payphone Orders require ILECs to file intrastate tariffs in compliance with the "new services test" with the state.[20] It is important to note again that those tariffs are intrastate tariffs. The Commission specifically stated that for purposes of meeting the requirements necessary to receive payphone compensation, the effectiveness of LEC intrastate tariffs should be considered on a state-by-state basis.[21] Jurisdiction over intrastate tariff proceedings rests with the individual state commissions. Reviewing and monitoring of those tariffs is a state function utilizing the state procedures, rules and laws. The Commission recognized this fact in both the *Reconsideration Order* in 1996, and again in the *Wisconsin Order* in 2002. The Commission stated that in the interest of federal-state comity, the Commission would rely on the states to ensure compliance.[22] The Commission asserted its availability only in cases where a state can not handle the filing and the state asks the ILEC to file the tariffs with the Commission.[23] The consolidated petitions were not filed by the ILEC at the request of the governing state authority.

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18 *Reconsideration Order* at ¶ 163.
19 *Wisconsin Order* ¶ 15.
20 *Bureau Clarification Order* at¶¶. 1, 2, 6, 8, 9, 10, 11, 12 (references to intrastate tariff).
21 *Id.* at ¶ 12.
22 *Wisconsin Order* at ¶ 15.
23 *Id.*

Despite the radical claims by the consolidated petitions, the state-by-state process created by the Commission is working and should not be disturbed by a declaratory ruling. The SPCA request incorporates a list from the IPTA petition, of six state commissions that have entered orders issuing refunds relating to payphone rates in excess of the "new services test".[24] The examples cited and incorporated by the consolidated petitions are proof that the Commission's process of state monitoring is successful. Three of the cases were stipulated results and three were ordered by the state regulator. The order adopting the Tennessee stipulation was challenged on appeal in the state appellate system and the refunds were upheld under Tennessee law. In each case the state regulatory process was used to apply and grant refunds of rates. Each of those cases had independent findings and independent application of the "new services test", specific to that state. The fact that other states have not found a violation existed or do not have the statutory authority to grant a refund if a violation does exist is not a reason for the Commission to issue a declaratory ruling.

The IPTA and the SPCA have state appellate remedies available. The SPCA is so confident in its right to refunds under Mississippi state law that it relies upon and outlines that authority in its filing to the Commission.[25] The SPCA is convinced that Mississippi has the authority necessary to grant the refund, relegating the federal preemption argument to passing comments and footnotes. That argument should be presented in Mississippi, not to the Commission. That is exactly what the Commission's process envisioned. Both petitioners should avail themselves of the state appellate

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[24] IPTA Petition for Declaratory Ruling at 15.
[25] SPCA Petition for Declaratory Ruling at 8-9.

process and not seek to challenge the Commission's methodology by filing for relief at the Commission.

Each state has its own unique factual circumstance making a broad declaratory ruling by the Commission inappropriate. For example, the SPCA characterizes the large decrease in rates its members pay as a tacit admission that the rates had been out of compliance with the "new services test". Nowhere did the Mississippi Public Service Commission ever make a finding of previous noncompliance with §276. In fact, as shown by SPCA's own petition, the tariffs were approved after the *Bureau Clarification Order* and not challenged by the Gulf States Public Communications Council, the predecessor to the SPCA. Exhibit A to the SPCA petition is the Mississippi Public Service Commission's Order, highlighting the fact that SPCA's predecessor did not appeal or contest the July 14, 1997 Order approving Bell South's tariff pay telephone access service rates to which they were a party.[26] The opinion of the SPCA that the rates were previously too high when its membership was involved in setting those rates is not enough to justify a refund of rates. That finding must come from a state commission. There should no longer be a debate about refunds especially in the absence of a finding of noncompliance with §276. That is the state's purview and the state did not find a violation in existence.

The continuing review by state commissions of the intrastate tariffs and subsequent decreases in the rate does not automatically translate into a previous

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[26] *In Re: Complaint of the Southern Public Communication Association for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to its Rates for Payphone Line Access, Usage, and Features*, Miss. Publ. Serv. Comm'n Docket No. 2003-AD-927 at 2. (Exhibit A to the SPCA petition).

unreasonable rate. The Commission recognized in the *Wisconsin Order* that many states were applying the "new services test" in a number of different ways. In fact, the Commission expressed hope that its decision could assist states in applying the test.[27] And it did. The recent flurry of updates to intrastate tariffs across the country is a direct result of the guidance provided by the Commission in the *Wisconsin Order*. The Commission reiterated its preference for state review of the tariffs and provided an example of how to apply the standard. In clarifying its delegation of review to the states in the *Wisconsin Order*, the Commission has already clarified the legal issue sought to be answered by the consolidated petitions.

The Ohio Commission has consistently applied the directives delegated by the Commission in the Payphone Orders. After the initial orders establishing the process, the Ohio Commission opened docket 96-1310-TP-COI, to enact the changes and continue to monitor the need for more changes. Then again after the Commission provided the *Wisconsin Order,* the Ohio Commission applied that modified rationale and significantly reduced the payphone rates.[28] That ongoing compliance based on updated Commission interpretations and updated cost data should not be used to judge the sufficiency of the previous rates unless the state agency that has presided over the process from the beginning determines that fact. It is simply unfair for the SPCA and the IPTA to ask the Commission to step in years after the fact and declare years of state compliance with the Commission's directives as incorrect after the fact. It would be punishing the states for

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[27] *Wisconsin Order* at ¶2.

[28] *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services,* Case No. 96-1310-TP-COI (Opinion and Order) (September 1, 2004); (Entry on Rehearing) (October 27, 2004). This order is still subject to the appeal process in Ohio.

complying with the Commission interpretations. Any request seeking refunds based on the difference between the two rates ignores reality and offends state commission's actions to comply with the previous Commission decisions. The Ohio Commission kept watch over its ongoing duty delegated by the Commission. As evidenced by the numerous examples cited by the IPTA petition, other states are also fulfilling their duty. A ruling at a state commission contrary to the payphone providers preferred position is not justification for the SPCA and IPTA to abandon the Commission's chosen path and shop for a different forum.

In proceedings involving the state application of federal standards the Commission defers to the state proceeding as a practical matter and just as the Commission stated in the *Wisconsin Order* in this case,[29] as a matter of federal-state comity.[30] In one similar proceeding the Commission even noted that if the complainants disagreed with the determination of particular state commissions, they could seek relief in court.[31] That same option is available to the consolidated petitioners in this case. There is simply no reason to seek the relief requested in a declaratory ruling.

B. The States' filed-rate doctrines are not preempted by any provision of the 1996 Telecommunications Act.

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[29] *Wisconsin Order* at ¶ 15.

[30] Memorandum Opinion and Order, Petition of WorldCom, Inc. for Preemption, 17 FCC Rcd 27039, 27048-49, Para. 18 (2002); Order on Reconsideration, Application by Bell Atlantic New Your for Authorization Under 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York, 16 FCC Rcd 11457, 114560, Para. 9 (2001); Memorandum Opinion and Order, Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc., 14 FCC Rcd 12530 (1999).

[31] *AT&T Corp. v. Bell Atlantic Corp.*, 15 FCC Rcd 17066 (2000) aff'd *MCI WorldCom, Inc. v. FCC*, 274 F.3d 542 (D.C. Cir. 2001) ¶. 17071.

Despite SPCA's explanation of the state law remedy available to the refund requested, the petition also argues that the state process is preempted to the extent it does not allow retroactive credits.[32] It is not clear how a finding of preemption of a state's filed-rate doctrine would assist an effort to secure the present requests for refunds. The petitioners ask the Commission to first declare a violation exists, in the absence of the full record, and then to force the state to exercise a federal power that does not exist. The petitioners claim that §276 preempts the filed-rate doctrine followed in most state jurisdictions, therefore, preventing the states from the burden of complying with their own state law. This preemption analysis is incomplete.

If the federal act preempts the state action then the state has no power to act and the federal authority and process would be applied. Not a single federal statute is cited authorizing a refund. In the absence of any federal authority to achieve the requested result, there is no authorization to act. That is because no such authority exists.[33] Preemption does not serve to release state actors from any and all legal constraints. Preemption simply shifts the controlling law to the federal level. When preempted, a state can not act unless the federal government has that authority and delegates it to the state. The federal government can not delegate authority it does not possess.

There is no federal authority to authorize a state to grant retroactive rates or refunds as requested by the consolidated petitions. The SPCA attempts to justify the right to retroactively adjust rates through a refund based upon a state law justification.

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[32] In large part the SBCA petition adopts the rational from the IPTA petition.

[33] The only refund even contemplated by the Commission is the rebate required in the *Bureau Reconsideration Order*. This was a refund that LECs had to agree to provide in order to take advantage of the 45-day extension offered by the Commission. That was a very limited timeframe and defined ahead of time not after the fact like the refunds now being sought.

The landmark cases cited as authority for refund justification deal with motor carriers, more specifically contract carriers. In both *Maislin Industries, v. Primary Steel, Inc.,* 497 U.S. 116; 110 S. Ct. 2759 (1990), and *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co*., 284 U.S. 370, 52 S. Ct. 183 (1932), reparations were contemplated based on authorization under the Interstate Commerce Act. The payphone rates are governed by the Telecommunications Act of 1996, not the Interstate Commerce Act. No such provision exists in the statute in this case. The lack of any federal statute authorizing the refunds means the filed-rate doctrine is not preempted because it does not conflict with a federal provision.

CONCLUSION

The Ohio Commission respectfully requests that the Commission continue its practice of allowing the state-by-state consideration of matters concerning the adequacy of intrastate tariffs governing the rates as provided by §276. The states are doing everything asked by the Commission, monitoring the rates through the state process and updating the rates when modified by Commission rules. As anticipated by the Commission, there are procedures within the state system should any change in rates be required. The Commission should continue its practice of comity with the state commissions and deny the requests for declaratory rulings.

Respectfully submitted,

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